STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2010
v	No. 292422 Muskegon Circuit Court
NICHOLAS JOHN HORAN, Defendant-Appellant.	LC No. 09-057367-FH

Before: STEPHENS, P.J., and MARKEY and WILDER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of possession of child sexually abusive material, MCL 750.145c(4), and three counts of using a computer to a commit crime, MCL 752.797(3)(f). He was sentenced to concurrent prison terms of 23 to 48 months each for the child sexually abusive material convictions and 56 to 84 months for two of the computer-related convictions, and a term of 49 to 84 months for the third computer-related conviction, the latter term to be served consecutively to one of the child sexually abusive material sentences. He was sentenced to 49 to 84 months in prison for the remaining using a computer to a commit crime conviction (count VI), which was consecutive to the third possession conviction (count III). Defendant appeals as of right. We affirm.

Defendant's convictions arise from the discovery of child pornography on a computer in defendant's home. The principal defense theory at trial was that someone other than defendant downloaded the material onto the computer.

I. VALIDITY OF SEARCH

Defendant argues that the trial court erred in denying his motion to suppress the evidence that was discovered during a search of his home computer, which defendant contends was illegally seized and then illegally searched.

We review de novo a trial court's ultimate determination on a motion to suppress, but review the court's factual determinations regarding the validity and scope of consent for clear error, giving deference to the trial court's resolution of conflicting evidence and witness credibility. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005). A finding is clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake was made. *Id.*

The evidence showed that the police contacted defendant's wife, Barbie Horan, after receiving information that a member of her household may have been sexually abused by another family member. Barbie disclosed to Trooper Chris Prevette that defendant viewed pornography on the home computer. The police obtained Barbie's consent to take the computer, following which it conducted an examination of the computer's contents. The police discovered more than 3,000 files of pornography, including some files that depicted child pornography. Defendant does not challenge Barbie's authority to give consent to the computer's removal. Rather, he argues that her consent was not voluntary, and further argues that, even if it were voluntary, she consented only to the removal of the computer from the home, not a search of the data content stored inside. We disagree.

The United States and Michigan Constitutions guarantee a person's right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Generally, warrantless searches are unreasonable per se. *Dagwan*, 269 Mich App at 342. However, voluntary consent is an exception to the warrant requirement. *Id.* The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal and specific, and freely and intelligently given. *People v Beydoun*, 283 Mich App 314, 337; 770 NW2d 54 (2009). The validity of a consent is determined under the totality of the circumstances, which is a question of fact. *Dagwan*, 269 Mich App at 342.

A. VOLUNTARINESS

Defendant argues that Barbie was unable to freely and intelligently consent to the seizure of the home computer because of her physical and emotional condition at the time consent was given, and because any purported consent was obtained through police coercion and threats from a Protective Services worker that her children would be taken away if she did not cooperate. However, the only evidence of Barbie's severe emotional state and physical manifestations, the alleged police coercion, and threat to take away her children, was Barbie's testimony. In contrast to Barbie's testimony, Trooper Prevette testified that although Barbie seemed very concerned about the allegations of sexual abuse against a family member, she was cooperative and, when he asked her if she was okay, she stated that she was fine. Trooper Prevette also testified that Barbie never mentioned having a doctor's appointment and denied that she was ever prevented from seeing a doctor or picking up medication, as Barbie had claimed.

Trooper Prevette explained that after he informed Barbie of the nature of the allegations, Barbie mentioned that defendant watched pornography on the home computer, so he asked her if he could take it for further investigation. She consented. Kim Watson, a Children's Protective Services investigator, was with Trooper Prevette at the time and heard Barbie verbally consent to the computer's seizure. Later, after Barbie returned to her home, another officer, Trooper John Forner, took the computer after Barbie signed a written consent form. Conflicting testimony was presented concerning the events at the home. Trooper Forner denied Barbie's claims that Barbie had already left the house before the police arrived, that the police threatened to break inside the house if Barbie did not return to let them in, and that the police forced Barbie to carry the computer outside.

As the trial court observed, the determination whether Barbie's consent was voluntarily given depended largely on credibility. The trial court expressly found that Barbie's testimony was not credible. We disagree with defendant's argument that the trial court's credibility

determination should not be given deference. The trial court was in a superior position to evaluate credibility. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); MCR 2.613(C). Moreover, its credibility determination was based in part on Barbie's specific lack of memory. Barbie was able to consistently answer defense counsel's questions, but often had memory lapses during questioning by the prosecutor. Further, Barbie's testimony lacked independent corroboration. Under the circumstances, we find no reason to disturb the trial court's credibility determinations. Given those determinations, the trial court did not clearly err in finding that Barbie's consent was freely and intelligently given.

B. SCOPE

Defendant also challenges the scope of Barbie's consent. He contends that Barbie only consented to the seizure of the computer, not a search of its contents. We disagree.

The scope of a person's consent to search is determined under an objective standard. *Dagwan*, 269 Mich App at 343. It is what the typical reasonable person would have understood it to be under the circumstances. *Id*. The scope of a search is generally defined by its express object. *Id*.

Here, the object of the search was a computer. Although Barbie testified that she was not told that the police wanted to examine the computer's contents, Trooper Prevette expressed an interest in the computer only after Barbie told him that defendant had watched a lot of pornography on it. Further, Trooper Prevette testified that he told Barbie that he wanted to take the computer for further investigation. Moreover, a reasonable person would know that a computer could be used to commit crimes and contain child sexually abusive material in the form of electronic images. *Id*. at 344. Under the circumstances, it was objectively reasonable for the police to believe that Barbie's consent included consent to examine the contents of the computer.

Defendant is correct that the terms "search" and "seizure" have different meanings under the Fourth Amendment. See *Terry v Ohio*, 392 US 1, 16; 88 S Ct 1868; 20 L Ed 2d 889 (1968) (defining terms "search" and seizure"). However, the analysis of the scope of Barbie's verbal consent is not limited to only the words that were used. It is only one factor to consider in determining what a typical reasonable person would have understood the scope to be based on the exchange between the officer and the person giving consent. See *Dagwan*, 269 Mich App at 343-345.

Defendant also focuses on the fact that only the first section of the written consent form that Barbie signed was checked. The first section authorized the police "[t]o conduct a complete search of the premises and property including all buildings and vehicles, both inside and outside the property located at: [Barbie and defendant's residence]." The second section, which was not checked, authorized the police "[t]o conduct a complete search of the motor vehicle . . . including the interior, trunk, engine compartment, and all containers therein." Defendant asserts that because the word "containers" is not included in the first section, and because the second section was not checked, Barbie's consent to search did not extend to a search of the computer's contents. We disagree.

By its express terms, the second section applies only to searches of motor vehicles. In this case, the computer was located inside Barbie and defendant's house, not an automobile. Thus, the second section was not applicable. Accordingly, it is immaterial that the second section was not checked. The language of the first section is sufficiently broad to include containers. As in the second section, the first section authorizes the police to conduct a "complete" search of the "premises *and* property," thereby authorizing a total, unqualified, or thorough search. *Dagwan*, 269 Mich App at 344-345. The language is broad enough to lead a reasonable person to understand that the scope of consent that was given in this case included a search of the computer's data content. *Id*. at 345. Under the totality of the circumstances, the trial court did not clearly err in determining that the scope of Barbie's consent, whether verbal or written, included a search of the computer's content.

For these reasons, the trial court did not err in denying defendant's motion to suppress the evidence obtained from the computer.

II. OTHER ACTS EVIDENCE

The charges in this case arose from a police investigation that began after a child in defendant's household made allegations of sexual misconduct against defendant. The trial court granted the prosecutor's motion to admit evidence of defendant's alleged misconduct under MRE 404(b)(1). Defendant challenges that decision. We review for an abuse of discretion a trial court's decision regarding the admissibility of evidence pursuant to MRE 404(b). *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). A trial court abuses its discretion when it chooses an outcome that is outside the principled range of outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

A. ADMISSIBILITY

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b)(1), evidence of other bad acts (1) must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value may not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). The prosecutor bears the burden of establishing relevance. *Knox*, 469 Mich at 509. Evidence is relevant if it could make a material fact in issue more probable or less probable than it would be without the evidence. *Id*.

Proffered evidence is unfairly prejudicial if it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury, *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010), or it would be inequitable to allow use of the evidence, *Waclawski*, 286 Mich App at 672. The determination whether the probative value of evidence is substantially outweighed by its prejudicial effect is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony. *Id*. at 670.

The prosecutor sought to admit evidence of defendant's sexual contact with a family member to show that he had a sexual interest in children, making it more likely that he was the person who downloaded the child pornography onto his computer. MRE 404(b)(1) expressly allows other acts evidence to be introduced for the purpose of proving identity. Moreover, identity was the principal issue at trial in light of the defense theory that other people had access to the computer and could have downloaded the illegal pornography.

To be admissible, however, the evidence must be logically relevant to the purpose for which it is offered. In *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998), the Court explained:

> Pursuant to MRE 401, evidence is relevant if two components are present, materiality and probative value. Materiality is the requirement that the proffered evidence be related to "any fact that is of consequence" to the action. "In other words, is the fact to be proven truly in issue?" A fact that is "of consequence" to the action is a material fact. "Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial."
>
> It is well established in Michigan that all elements of a criminal offense are "in issue" when a defendant enters a plea of not guilty. Because the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant specifically disputes or offers to stipulate any of the elements, the elements of the offense are always "in issue" and, thus, material. [Citations omitted.]

Here, the evidence was offered for its relevance in establishing defendant's identity as the person who downloaded the child pornography onto the computer and thus possessed it. Defendant's identity as the person who committed the charged offenses was an essential element that the prosecutor needed to prove. Therefore, the evidence was material.

For evidence to be relevant, it must also have probative value. In *Crawford*, *id.* at 389-390, the Supreme Court stated:

> The probative force inquiry asks whether the proffered evidence tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The threshold is minimal: "any" tendency is sufficient probative force. In the context of prior acts evidence, however, MRE 404(b) stands as a sentinel at the gate: the proffered evidence truly must be probative of something *other* than the

> defendant's propensity to commit the crime. If the prosecutor fails to weave a logical thread linking the prior act to the ultimate inference, the evidence must be excluded, notwithstanding its logical relevance to character. [Citations omitted; emphasis in original.]

In this case, the charged offenses were based on three videos on defendant's computer, each of which depicted a young female child engaged in sexual conduct. The evidence of defendant's uncharged sexual misconduct toward a female child in his household and the evidence that defendant frequently watched pornography on his computer permitted the jury to infer that defendant was sexually attracted to young girls, and that he used his computer to view child pornography, making it more likely that he was the person who downloaded the child pornography that was found on his computer. Accordingly, the evidence was relevant to a proper purpose under MRE 404(b)(1).

Lastly, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Although the evidence had a tendency to complicate the issues at trial, and defendant asserted that the family member had recanted her allegations, the probative value of the evidence was great, given that it was relevant to the principal issue at trial. The fact that the "sleeping girl" video and the uncharged acts were substantially similar increased the evidence's probative value, as did defendant's admission that the similar acts occurred on one occasion, albeit accidentally. Also, the trial court gave a limiting instruction that was designed to minimize any prejudicial effect. Further, the limited form of the evidence that was presented, as opposed to calling the child family member to testify concerning the alleged abuse, reduced the potential prejudicial effect of the evidence. Under the circumstances, the trial court's determination that the probative value of the evidence was not substantially outweighed by its prejudicial effect was within the range of reasonable and principled outcomes and, accordingly, the court did not abuse its discretion in allowing the evidence.

B. CONSTITUTIONAL VIOLATION

Defendant also argues that his constitutional right to a fair trial was violated because the trial court allowed the prosecutor to use this trial to test the evidentiary strength of the other acts evidence for a potential prosecution for second-degree criminal sexual conduct based on the family member's allegations. Because defendant did not object to the evidence on this basis at trial, this issue is not preserved. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004) (an objection on one ground is insufficient to preserve an appellate attack on a different ground). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Knox*, 469 Mich at 508. Essentially, defendant contends that evidence of uncharged misconduct should not be admitted when it is possible that the alleged misconduct could be the subject of criminal charges in the future. Defendant cites no authority for this proposition and does not explain how the authority he does cite supports his position. Accordingly, he may be deemed to have abandoned this argument. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Regardless, we find no merit to this issue. "MRE 404(b) specifically addresses the admissibility of *uncharged* conduct." *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998) (emphasis in original). The rule contains no limitation on uncharged conduct that otherwise satisfies the rule's requirements for admissibility. Further, our Supreme Court has stated that proper employment of the evidentiary safeguards in MRE 404(b) sufficiently protects a defendant's right to a fair

trial. *Crawford*, 458 Mich at 385-388; *Starr*, 457 Mich at 496. Accordingly, there was no plain error affecting defendant's substantial rights.

III. CONSECUTIVE SENTENCING

Defendant challenges the trial court's decision to impose a consecutive sentence for one of his convictions for using a computer to commit a crime. We review for an abuse of discretion a trial court's decision to impose consecutive sentencing. *People v St John*, 230 Mich App 644, 646; 585 NW2d 849 (1998).

In Michigan, concurrent sentencing is the norm, and a court may impose consecutive sentences only if authorized by statute. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). The Legislature has authorized consecutive sentencing for a conviction involving the use of a computer to commit a crime. MCL 752.797(4).[1] "The purpose of consecutive sentencing is to 'enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts.'" *People v Chambers*, 430 Mich 217, 229; 421 NW2d 903 (1988) (citation and emphasis omitted). "The '[i]mposition of a consecutive sentence is strong medicine. It may well be warranted in some cases. But it should be used only after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition.'" *Id*. at 231 (citation omitted).

In this case, the trial court imposed a consecutive sentence for the use of a computer conviction that related to defendant's possession of the "Vicky" file. The court stated, "That Vicky tape was appalling. All the tapes were disturbing, but that Vicky tape involving a girl that couldn't be more than eight or nine, doing what she was coaxed to do, with a grown man, and the degradation that culminated at the end is just terrible." The court also commented that people who download child pornography contribute to its demand.[2] Defendant does not dispute the trial court's description of the images, but rather argues that consecutive sentencing is more appropriate in cases where a defendant is the purchaser, producer, distributor, or collector of large quantities of child sexually abusive material. Although we agree that these factors may be appropriate considerations in deciding whether to impose a consecutive sentence, we disagree with defendant's argument that the content of child sexually abusive material cannot also provide a basis for imposing a consecutive sentence. Although defendant contends, and we agree, that all child pornography is offensive, it is not inappropriate for a trial court to take into consideration

---

[1] Subsection (4) provides:

> The court may order that a term of imprisonment imposed under subsection (3) be served consecutively to any term of imprisonment imposed for conviction of the underlying offense.

[2] Defendant not only demonstrated an interest in child pornography through the files categorized as such on his computer, but also by the multitude of other files that contained names suggestive of child images.

the increasing degree of indecency or vulgarity when deciding whether to impose a consecutive sentence.

Defendant also argues that the longer maximum prison term for using a computer to commit an underlying offense, when compared to the maximum term for the underlying offense,[3] is itself sufficient additional punishment. However, because the Legislature both established the maximum penalty for using a computer to commit a crime and authorized a consecutive sentence for a conviction of that offense, this argument is not a persuasive basis for finding that the trial court's imposition of a consecutive sentence was improper. Ultimately, this Court's task is to determine whether the outcome selected by the trial court is a reasonable and principled one. The trial court recognized its discretion to impose either concurrent or consecutive sentences for defendant's three convictions for illegal use of a computer, and opted to impose a consecutive sentence for just one of those convictions. That decision was based on the trial court's observation that, while all of the child pornography videos were offensive, the "Vicky video" was materially more offensive than the others. The trial court's decision was also designed to deter defendant from using a computer to download child sexually abusive materials in the future and to decrease demand for such material by removing a user of the material. The trial court's imposition of a consecutive sentence for one of the three computer-related convictions was a reasonable and principled decision and, therefore, was not an abuse of discretion.

IV. SCORING OF OFFENSE VARIABLES

Defendant lastly argues that the trial court erred in scoring offense variables (OV) 12 and 19 of the sentencing guidelines. When scoring the sentencing guidelines, a sentencing court has discretion in determining the number of points to be scored provided there is evidence in the record that adequately supports a particular score. *Waclawski*, 286 Mich App at 680. The trial court's scoring of offense variables is determined by reference to the record, using the preponderance of the evidence standard. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

A. OV 12

OV 12 provides that 25 points are to be scored where "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(a). A felonious criminal act is contemporaneous if "[t]he act occurred within 24 hours of the sentencing offense" and "[t]he act has not and will not result in a separate conviction." MCL 777.42(2)(a). Defendant contends that he did not possess three or more uncharged files contemporaneously with a sentencing offense file because only one uncharged file and one sentencing offense file were downloaded within 24 hours of each other. Defendant relies on *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), to argue that possession of child sexually abusive material is complete when the material is acquired, e.g., by being downloaded

[3] The maximum penalty for using a computer to commit a crime is only longer where the underlying felony has a one-, two-, or four-year maximum term. MCL 752.797(3)(b)-(d).

from the internet. He asserts that continued retention of the files is irrelevant because the Court in *McGraw* rejected the concept of a continuing crime for scoring purposes. We disagree.

In *McGraw*, the Court held that "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id*. at 122. However, *McGraw* did not address when a given offense is complete. The Court specifically noted that under the facts of the case, it did not need to resolve that question. *Id*. at 135 n 45. Possession offenses are, by nature, continuing offenses. The offense is not complete until the perpetrator is dispossessed of the object of the offense. *People v Cooks*, 446 Mich 503, 532 n 4; 521 NW2d 275 (1994) (Levin, J., dissenting) (criminal acts of possession are continuous in nature); *People v Beverly*, 247 Mich 353, 355-356; 225 NW 481 (1929) (possession of intoxicating liquor is a continuous offense for as long as the possession exists). Because possession is a continuing crime, the offenses of possession of child sexually abusive material, charged and uncharged, were continuing crimes as long as defendant possessed the computer files. Therefore, the trial court properly could consider defendant's contemporaneous possession of the uncharged files containing child pornography for purposes of scoring OV 12, regardless of when the files were downloaded.

On appeal, defendant also asserts that the record does not support a finding that the five other files in the SYSXL folder, where the charged files were located, contained child sexually abusive material. Because defendant did not object to the scoring of OV 12 on this basis below, this issue is unpreserved. Accordingly, defendant has the burden of demonstrating a plain error affecting his substantial rights. *Kimble*, 470 Mich at 312. At trial, no one testified regarding whether the five uncharged files actually contained child sexually abusive material. However, the prosecutor introduced an exhibit that contained thumbnail photographs of the eight files in the SYSXL folder, which the trial court was able to view. Also, the presentence report, the accuracy of which defendant did not challenge at sentencing, indicates that the additional files were clearly child sexually abusive material based on the apparent ages of the victims depicted. Therefore, the record supports the trial court's determination that at least three of the uncharged files contained child sexually abusive material. Accordingly, the trial court did not clearly err in finding that defendant committed at least three contemporaneous felonious acts, and it did not abuse its discretion in scoring 25 points for OV 12.

B. OV 19

Defendant also argues that the trial court erred in scoring ten points for OV 19 on the basis that defendant "interfered with or attempted to interfere with the administration of justice," MCL 777.49(c). It is unnecessary to resolve this issue in light of our conclusion that 25 points were properly scored for OV 12. Any error in scoring ten points for OV 19 would not affect the appropriate guidelines range and would be harmless. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). Even if we were to consider this argument, however, defendant's contradictory trial testimony and prior statements to police regarding separate allegations could be characterized as perjury, and therefore an interference with law enforcement officers and their investigation of a crime, for scoring purposes. Furthermore, defendant's reliance on *McGraw*, 484 Mich at 133, for the proposition that "[o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable," is misplaced because he failed to preserve the argument. See *People v Mushatt*, 486 Mich 934; 782 NW2d 202 (2010)

("that the retroactive effect of McGraw is limited to cases pending on appeal when McGraw was decided and in which the scoring issue had been raised and preserved.").

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Jane E. Markey
/s/ Kurtis T. Wilder